OAH Docket No. 12-2500-17037-2
MPUC Docket No. CN-05-619

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Application of Otter Tail Power Company and Others for Certification of Transmission Facilities in Western Minnesota

ORDER DEFINING ISSUES TO BE CONSIDERED AND RULING ON MOTION FOR PROTECTIVE ORDER

On November 7, 2007, the Applicants filed a Motion for Protective Order and supporting memorandum. On November 8, 2007, the Joint Intervenors[1] filed a response in opposition to the motion. Argument regarding the motion was heard by telephone conference call on November 15, 2007. Additional materials pertaining to the motion were filed by the parties following oral argument. Further, as required by the Scheduling Order, on November 19, 2007, Statements of the Issues were filed by the Applicants, Joint Intervenors, Excelsior Energy, and the Department.

Based on the arguments and submissions of the parties, and for the reasons set forth in the attached Memorandum,

IT IS HEREBY ORDERED that:

1. The issues to be determined in this recommenced matter are:

2. Whether the Applicants' demand for electricity cannot be met more cost effectively through conservation and DSM. This involves analysis under Minn. Stat. §§ 216B.243, subd. 3; 216B.243, subd. 3(8); and 216B.241, subd. 1c, enacted by the Legislature in its last session.

3. Whether the Applicants have shown that any non-renewable energy resource selected is less expensive than power generated by a renewable energy source. This involves analysis under Minn. Stat. §§ 216B.243, subd. 3a; 216B.2422, subd. 4; and 216B.1691, enacted by the Legislature in its last session.

4. The change in the costs of energy from a smaller Big Stone II. This is relevant to the comparative analyses involved in the foregoing issues and may be examined. This would include such sub-issues as whether the Applicants' use of $9.00 per ton as the cost of carbon dioxide regulatory costs is appropriate and whether their new levelized cost analysis is appropriate.

[1] The Joint Intervenors include the Minnesota Center for Environmental Advocacy; Minnesotans for an Energy Efficient Economy; the Izaak Walton League of America, Midwest Office; Wind on the Wires; and the Union of Concerned Scientists.

5. Consideration of transmission alternatives is not an issue in this matter because the proposed transmission lines are not significantly affected by the proposed reduction in the size of the Big Stone II generation facility. For the same reason, the Environmental Impact Statement is not an issue.

3. The Applicants' Motion for Protective Order is hereby GRANTED in part and DENIED in part. It is denied as to Information Requests 221, 222, and 233 (subsequently renumbered 226, 227, and 238), and the Applicants shall provide full responses to those IRs. It is granted as to the remainder of the Information Requests at issue here (223, 224, 225, 226, 228, 229, 230, and 232 (subsequently renumbered 228, 229, 230, 231, 233, 234, 235, and 237) to the extent set forth in the Memorandum below.

Dated: December 3, 2007

_/s/ Steve M. Mihalchick_____
STEVE M. MIHALCHICK
Administrative Law Judge

_/s/ Barbarar L. Neilson_____
BARBARA L.NEILSON
Administrative Law Judge

MEMORANDUM

Issues in Recommenced Proceeding

The Issue Statements filed by the Applicants, Joint Intervenors, Excelsior Energy, and the Department were in large part consistent with one another. Where they are not, we believe the analysis of the Department is correct and we adopt it as the basis for the foregoing Order.

Excelsior Energy suggested that the lack of participation by GRE and SMMPA in this recommenced proceeding would need to be addressed in new findings. That's true to the extent that only evidence regarding the remaining five participants will need to be addressed. The reason that GRE and SMMPA withdrew from the project does not appear to be relevant.[2]

The Applicants argue that the cost of future carbon dioxide regulation has already been considered and that their use of $9.00 per ton suggested by the Department to the Commission “seems to be the only proxy” available. That justification is insufficient to determine the value as a matter of law, even in a single case. They

[2] But we recognize the possibility of the withdrawals raising credibility issues, but do not believe that that is sufficiently probative of any of the primary issues to merit consideration.

may be correct and the Commission may ultimately adopt that value, but the issue of what value to use in this proceeding is still open to some dispute.

Motion for Protective Order

The rules of the Office of Administrative Hearings specify that any means of discovery available under the Rules of Civil Procedure for the District Court of Minnesota is allowed and authorize the filing of motions for protective orders. The rules further state that a party seeking discovery must show the discovery is needed for the proper presentation of its case, is not for delay, and the issues or amounts in controversy are significant enough to warrant the discovery, and a party resisting discovery may raise any objections that are available under the Minnesota Rules of Civil Procedure, including lack of relevancy and privilege.[3] Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.[4] It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate hearing or trial.[5] Administrative Law Judges at the OAH "have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."[6]

The definition of relevancy in the discovery context has been broadly construed to include any matter "that bears on" an issue in the case or any matter "that reasonably could lead to other matter that could bear on any issue that is or may be in the case."[7] As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.[8] In summary, "matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."[9] The definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes. Thus, information that is deemed relevant at the discovery stage may not necessarily be admissible evidence at the hearing.[10]

---

[3] Minn. R. 1400.6700, subp. 2.
[4] *See, e.g., Boldt v. Sanders*, 261 Minn. 160,111 N.W.2d 225 (1961).
[5] *See, e.g., Hickman v. Taylor,* 329 U.S. 495, 507 (1947), quoted with approval in *Jeppesen v. Swanson,* 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskervilie v. Baskerville,* 75 N.W.2d 762, 769 (1956).
[6] G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure,* § 8.5.2 at 135 (1998).
[7] *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978).
[8] *Boland v. Morrill,* 270 Minn. 86, 132 N.W.2d 711, 719 (1965).
[9] G. Beck, M. Gossman & L. Nehl-Trueman, Minnesota Administrative Procedure, § 9.2 at 146 (1998).
[10] 2 D. Herr & R. Haydock, *Minnesota Practice* 9 (2d Ed. 1985), *citing Detweiler Brothers v. John Graham & Co.,* 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.,* 298 N.W.2d 40 (Minn. 1980).

The application of these discovery standards in the present case must also take into consideration the limited scope and expedited nature of the recommenced proceeding. In its October 19, 2007, Order Recommencing Proceedings in the Office of Administrative Hearings, the Public Utilities Commission stated:

> The Commission believes that it is prudent and protective of the interests of all parties to examine the Applicants' revision of the Big Stone II Project in the context of recommenced proceedings conducted by the Office of Administrative Hearings. To expedite this process consistent with a due process, the Commission will request that the ALJs who have handled this matter to date continue to do so. In addition, the Commission will further request that the ALJs work with the parties to identify relevant issues and contested material facts regarding the revised Project and, consistent with due process and the ends of justice, establish an appropriate record on which to make a recommendation to the Commission regarding the merits of the revised Project.

The Commission's Order thus makes clear its intention that the focus of the supplemental proceedings must be on the merits of the revised Big Stone II Project and that the matter must proceed in an expeditious fashion to the extent consistent with due process principles.

In their Motion, the Applicants request issuance of a protective order with respect to Joint Intervenors' Information Requests Nos. 221-236. During oral argument, the Applicants clarified that the request for a Protective Order was not being made with respect to Requests 227 or 234-236.

The Applicants generally assert that a protective order is needed to place reasonable limits on discovery and prevent undue burden. They argue that they have already produced "extraordinary volumes of documents with detailed cost and other information regarding the proposed Big Stone Unit II project" and that, "[w]ith very few exceptions, the information Applicants supplied to Joint Intervenors regarding the internal discussion among the project representatives, consultants, vendors and advisors proved to be immaterial to Joint Intervenors' prefiled testimony in the prior proceedings in this docket."[11] The Applicants contend that the cost data, modeling input, and output files they have provided will afford the Joint Intervenors a sufficient basis to critically evaluate their cost, need, and alternative analyses. They emphasized in the memorandum in support of the motion that they were going to be providing the Joint Intervenors with cost data relating to the two additional options that have now been studied by the Applicants (a 500 MW plant and a 580 MW plant). They urged that the Joint Intervenors not be permitted to "rediscover information already obtained from Applicants" or to "unreasonably extend discovery beyond the legitimate scope of this proceeding."[12] In their response in opposition to the motion, the Joint Intervenors assert that the Information Requests at issue "simply seek to bring the materials that have

[11] Memorandum in Support of Motion at 2.
[12] *Id*. at 3.

already been produced [by the Applicants] up-to-date as of November 2007" and that the information sought is necessary to evaluate the reasonableness of the Applicants' claims regarding the expected cost and schedule of the Big Stone II project and the assumptions they use in their new modeling analysis.[13]

Based upon review of the Applicants' responses to the IRs of the Department and the Joint Intervenors to date, the Administrative Law Judges agree that the Applicants have already provided an extensive amount of information relating to the matters at issue in the current recommenced proceeding. Because of the more limited issues involved in the recommenced proceeding and the expedited nature of this proceeding, it cannot be assumed that the Joint Intervenors are automatically entitled to updates of all of the discovery that they previously obtained in this docket.

The specific IRs at issue in the Motion seek the following information:

IRs 221 and 222 (subsequently renumbered 226 and 227): the current cost estimates and current assumed inservice date for the Big Stone II project including, separately, the generation plant, transmission facilities, and delivery facilities, along with supporting materials. The Applicants indicated in connection with their Motion that they would address these IRs in their supplemental testimony filed on November 12, 2007. The Joint Intervenors pointed out that they wish to obtain supporting information as well, in order to be able to test the assumptions that were made in the prefiled testimony.

The ALJs conclude that, to the extent that the IRs also seek supporting materials relating to the cost estimates and assumed inservice date, that information is pertinent here. In the Applicants' formal responses to these requests, they provided responsive information without asserting any objection. The Motion for Protective Order is denied with respect to these two IRs.

IRs 223 and 228 (subsequently renumbered 228 and 233): all meeting minutes and presentations made at meetings of the Big Stone II co-owners, and project committees thereof, since January 1, 2007; and all notes, minutes, and records of the meetings of each of the co-owners' governing boards and committees, and any presentations made to such boards and committees addressing the design, cost, or schedule of Big Stone II. The Applicants contend that these requests are irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and likely to involve information that would be subject to attorney-client privilege. They also assert that IR 223 is unduly burdensome. The Joint Intervenors asserted that responses to these requests will be relevant to evaluate the reasonableness of the design, cost, and schedule projections of the Applicants and the assumptions used in their new modeling analyses. They also argue that these requests are not burdensome because they would merely involve locating business records for a relatively small number of meetings held within the past year, and contend that the mere fact that an attorney may have been present during the meeting would not necessarily

[13] Response in Opposition to Motion at 1, 2.

render the entire discussion privileged. They further assert that the Applicants answered similar requests in 2006 and provided relevant materials that had been prepared through the early fall of 2006, and argue that it is appropriate to require the Applicants to update those responses.

Although it does not appear that it would be overly burdensome for the Applicants to locate the requested records, it would be necessary for the Applicants to expend significant effort to review and redact the documents and prepare a privilege log. In light of the limited issues involved in the recommenced proceeding and the expedited nature of this proceeding, the ALJs conclude that the Protective Order should be granted as to these two IRs.

IR 224, 225, and 226 (subsequently renumbered 229, 230, and 231): all notes, minutes, and records of meetings with Black and Veatch since January 1, 2007, concerning the design, cost and schedule of the Big Stone II Project; all written and electronic correspondence between the co-owners and Black and Veatch since January 1, 2007; and all reports and analyses prepared by Black and Veatch since January 1, concerning the design, cost and schedule of the Big Stone II project. The Applicants assert that these requests are irrelevant, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding this objection, the Applicants did provide a response to IR 226 in which they indicated that Black and Veatch had continued to provide services since January 1, 2007, had not been asked to provide reports or analysis regarding design, cost, or schedule of the project, and had confirmed cost estimates prepared by Mr. Rolfes and his team.

The Joint Intervenors again asserted that responses to these requests will be relevant to evaluate the reasonableness of the design, cost, and schedule projections of the Applicants and the assumptions used in their new modeling analyses. They contend that these requests are not burdensome because these documents are kept in the ordinary course of business, and further assert that they are merely seeking updates of information provided by the Applicants in response to IRs served in connection with the 2006 hearing in this matter.

The ultimate opinion of the Applicants and Black and Veatch regarding the design, cost and schedule of the Big Stone II Project obviously is relevant in this matter, and documents underlying that opinion should be made available to the Joint Intervenors. However, these IRs attempt to reach well beyond this to encompass all meeting notes, correspondence, and records relating in any way to the design, cost, and schedule of Big Stone II. The Protective Order shall be granted to the extent that these IRs seek documents that exceed those that form a basis for the ultimate opinion.

IRs 229, 230, and 231 (subsequently renumbered 234, 235, and 236): copies of all invoices submitted to Big Stone II co-owners by Black and Veatch since November 1, 2006; all engineering, design, procurement or construction tasks in furtherance of the Big Stone II Project that have been undertaken by Black and Veatch or the co-owners since November 1, 2006; dollar amounts spent on design

and/or construction of the Project by the co-owners since November 1, 2006. The Applicants objected to these IRs on the grounds that they are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. They further objected to the request for information regarding tasks undertaken by Black and Veatch or the co-owners on the grounds that it is unduly burdensome and duplicative of other requests. Notwithstanding these objections, the Applicants did provide a response and supporting information relating to tasks undertaken by Black and Veatch between November 1, 2006, and June 26, 2007.

The Joint Intervenors contend that this request is relevant because it will reflect what work has been done on the project during the past year. They assert that the materials they are seeking are necessary to assess the reasonableness of the Applicants' current cost and schedule estimates. They again point out that they requested and were provided similar information through the early fall of 2006 and wish to update that information.

Because the information sought in IR 231 (amounts expended by the co-owners on design or construction of the Project since November 1, 2006) is directly relevant to the issue of costs associated with the Project, the Protective Order is denied as to that IR, and the Applicants shall provide a response. Because the information sought in IR 229 (the invoices submitted to the co-owners by Black and Veatch since November 1, 2006) should be encompassed within the Applicants' response to IR 231, that request is duplicative. As a result, the Protective Order shall be granted as to IR 229. Finally, the Protective Order is granted as to IR 230. By letter dated November 21, 2007, counsel for the Applicants explained that the information provided ended as of June 26, 2007, because no other work has been performed since that date. The Applicants thus have provided a sufficient response to this IR.

IR 232 (subsequently renumbered 237): all Loss of Load Expectation or Loss of Load Potential studies for each of the co-owners' systems prepared since December 1, 2006. The Applicants object to this IR on the ground that it is irrelevant, vague, and not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding this objection, the Applicants responded that the co-owners had not performed any LOLE or LOLP studies since December 1, 2006, and indicated that they believe these studies are performed by the Mid-Continent Area Power Pool.

The Joint Intervenors argued that the request was not vague and indicated that they simply wanted the Applicants to update their earlier response to a similar 2006 IR. They contend that recent LOLE and LOLP studies are essential in evaluating the reliability of each Applicants' system and the regional grid.

The Applicants have provided a sufficient response to this IR. The Protective Order is granted as to this Request, and no further response will be required.

IR 233 (subsequently renumbered 238): all new estimates or analyses by any of the current co-owners of the potential for energy efficiency or wind resources within their service areas. During oral argument, the Joint Intervenors

clarified that, in using the term “new,” they intended to encompass estimates and analyses made within the past year. The Applicants assert that this IR is irrelevant, vague, and not reasonably calculated to lead to the discovery of admissible evidence. The Joint Intervenors argued in response that this information is important to assess compliance with recent Minnesota legislation strengthening renewable energy and DSM requirements.

As noted above, the issues in the recommenced proceeding include whether the Applicants' demand for electricity cannot be met more cost effectively through conservation and DSM, and whether the Applicants have shown that the non-renewable energy resource selected is less expensive than power generated by a renewable energy source. The IR seeks discovery of information related to these critical issues. The Protective Order is denied as to this IR.

S.M.M./B.L.N.